



# PUBLIC NOTICE

Federal Communications Commission  
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**WIRELESS TELECOMMUNICATIONS BUREAU SEEKS COMMENT ON REQUEST BY  
DAKOTA CENTRAL TELECOMMUNICATIONS COOPERATIVE ET AL. FOR WAIVER OF  
THE REQUIREMENT TO TRANSITION TO THE NEW BRS/EBS BAND PLAN AND FOR  
SPECIAL TEMPORARY AUTHORITY TO OPERATE ON CERTAIN EBS CHANNELS IN  
BRUSH HILL, NORTH DAKOTA**

**Comment Date: June 25, 2007**

**Reply Date: July 10, 2007**

Dakota Central Telecommunications Cooperative (DCTC), a provider of multichannel video and high-power wireless broadband services over licensed Broadband Radio Service (BRS) and licensed and leased Educational Broadband Service (EBS) spectrum centered at Brush Hill, North Dakota, together with EBS licensees Fessenden Public School, Midkota Public School, Gackle/Streeter Public School, Wimbledon/Courtenay Public School, Jamestown Public School, Pingree/Buchanan Public School, Fessenden-Bowdon Public School, Tappen Public School and Medina Public School (Brush Hill EBS Licensees), have filed a joint request for permanent waiver of the requirement that all BRS and EBS licensees transition to the new BRS/EBS band plan adopted in the Commission's *Report and Order* in WT Docket No. 03-66.<sup>1</sup> This band plan is set forth in Section 27.5(i)(2) of the Commission's Rules.<sup>2</sup> DCTC has also filed a request for Special Temporary Authority (STA) to utilize vacant EBS Channels C2, C3, and D3 to provide Multichannel Video Programming Distributor (MVPD) and broadband services from a transmit site located in Brush Hill, North Dakota.

In the *BRS/EBS R&O* and *FNPRM*, the Commission adopted a new band plan in an effort to modernize and enhance our rules and policies governing the licensing of the Educational Broadband Service (EBS) and the Broadband Radio Service (BRS) in the 2495-2690 MHz band.<sup>3</sup> Indeed, a critical element of the *BRS/EBS R&O* and *FNPRM* is the adoption of a market-oriented, transition mechanism that enables incumbent licensees to develop regional plans for moving to new spectrum assignments in the restructured band plan. The Commission, nevertheless, found that it is in the public interest to consider case-by-case waivers of the transition rules for a class of operators or their affiliates that: (1) meet the definition of a multichannel video programming distributor as defined in Section 522 of the Communications Act of 1934, as amended; and (2) provide MVPD service to five percent or more of the

<sup>1</sup> See Amendment of Parts 1, 21, 73, 74 and 101 of the Commission's Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands, *Report and Order and Further Notice of Proposed Rulemaking*, WT Docket No. 03-66, 19 FCC Rcd 14165 (2004) (*BRS/EBS R&O* and *FNPRM*), *affirmed in pertinent part by Order on Reconsideration and Fifth Memorandum Opinion and Order and Third Memorandum Opinion and Order and Second Report and Order*, 21 FCC Rcd 5606 (2006).

<sup>2</sup> 47 C.F.R. § 27.5(i)(2).

<sup>3</sup> *BRS/EBS R&O* and *FNPRM*.

households within their respective geographic service areas (GSAs), as calculated in accordance with the requirements of Section 76.905(c) of the Commission's rules.<sup>4</sup> The Commission further found that it is in the public interest to consider waivers for any BRS or EBS licensee that is collocated with any qualified MVPD licensee that seeks a waiver to opt-out.<sup>5</sup> The Commission further found that it is in the public interest to consider waivers for those BRS licensees that have a viable business for high-powered operations, but who need more than seven digitized high-powered MBS channels to deliver their service to their customers. The Commission stated that in reviewing requests to waive the rules, the Commission would consider the actions taken by MVPD or BRS licensees to minimize the effect of interference on neighboring markets, as well as the licensee's explanation as to why it cannot work within the transition rules. The Commission stated that waivers will be granted if it is shown that: (i) the underlying purpose of the rules(s) would not be served or would be frustrated by application to the instant case, and that a grant of the requested waiver would be in the public interest; or (ii) in view of the unique or unusual factual circumstances of the instant case, application of the rule(s) would be inequitable, unduly burdensome or contrary to the public interest, or the applicant has no reasonable alternative.<sup>6</sup>

On April 25, 2007, DCTC and the Brush Hill EBS Licensees (collectively, *DCTC et al.*) filed a joint request for waiver in order to opt out of transitioning to the new band plan. *DCTC et al.* requests waiver of Sections 27.1230 *et. seq.* of the Commission's Rules,<sup>7</sup> and also requests that the Commission issue certain clarifications. Specifically, *DCTC et al.* requests that grant of the requested waiver specifically state that:

- (1) DCTC and its channel lessors will have permanent authority to operate within the Brush Hill GSA pursuant to Section 27.1209 on the "pre-transition" BRS/EBS band plan set forth in Section 27.5(i)(2)(ii) and (iii);
- (2) Licensees and DCTC's channel lessors must participate in good faith in any transition planning process relating to any geographic area that overlaps their GSAs. In conjunction with any transition, the Licensees and DCTC's channel lessors will subsequently make such modifications to their facilities at the proponent's expense (unless otherwise agreed) as the proponent may reasonably request in an effort to reduce interference to licensees in other markets that are transitioning, provided that such modifications can be accomplished without cumulatively resulting in more than a *de minimis* reduction in DCTC's ability to serve its then-existing subscribers;
- (3) Every main, booster, and base station currently used in conjunction with the Licensees' systems shall be permitted to continue operating under the maximum EIRP limits set forth for "pre-transition" operations in Section 27.50(h)(1)(i) and (ii) until such time as the EBS licensees' facilities are migrated to an alternative system and after such time, every main, booster, and base station currently used in conjunction with DCTC's system shall be permitted to continue operating under the maximum EIRP limits set forth

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<sup>4</sup> 47 CFR § 76.905(c). The original proposal to permit MVPDs to opt out of the transition was presented to the Commission by the Wireless Communications Association, International, the Catholic Television Network, and the National ITFS Association in October 2002. *See generally* A Proposal for Revising the MDS and ITFS Regulatory Regime, RM-10586 (filed Oct. 7, 2002). As adopted, the *BRS/EBS R&O* and *FNPRM* significantly altered that proposal.

<sup>5</sup> *BRS/EBS R&O*, 19 FCC Rcd 14165, 14199 ¶ 77.

<sup>6</sup> 47 C.F.R. § 1.925(b)(3).

<sup>7</sup> 47 C.F.R. § 27.1230 *et. seq.*

for “pre-transition” operations in Sections 27.50(h)(1)(i) and (ii) on the “post-transition” BRS/EBS band plan set forth in Sections 27.5(i)(2)(ii) and (iii);

(4) Any channels used for the transmission of digital video programming on DCTC’s system shall be permitted to continue operating under the “pre-transition” emission limits for digital video programming channels set forth in Section 27.53(l)(3);

(5) Consistent with Section 27.55(a)(4)(i), all of the BRS and EBS channels in DCTC’s Brush Hill system will be permitted to operate at any point along their respective GSA boundaries at the greater signal strength of 47 dBu or the strength authorized in their underlying licenses as of January 10, 2005;

(6) Sections 27.1220 (regarding 5.5 MHz wide channels in the UBS) and 27.1222 (regarding the establishment of guard bands around the MBS) shall not be applicable to DCTC and its channel lessors operating on the “post transition” BRS/EBS band plan set forth in Sections 27.5(i)(2)(ii) and (iii); and

(7) DCTC and its channel lessors shall not be subject to the height benchmarking obligations set forth in Section 27.1221.

(8) Upon replacement of their existing point-to-point EBS facilities, the licensees of two of the EBS point-to-point stations will, consistent with the spectrum plan depicted in Appendix C, swap or assign (subject to Commission approval) the licenses so that they are licensed on channels A4 and B4 as designated by the “post-transition” BRS/EBS band plan set forth in Section 27.5(i)(2)(ii);

(9) Upon replacement of their existing point-to-point EBS facilities, the licensees of the remaining seven EBS point-to-point stations will make available their channels for excess capacity lease at nominal consideration to the holder of the BTA authorization where their licensed GSA center point is situated. If the holder of the BTA authorization does not desire to lease any or all of the excess capacity on such stations, such licensees will submit their authorizations for cancellation; and

(10) The two EBS licensees that migrate to MBS channels A4 and B4 will apply to the Commission to conform their GSAs to the GSA of the channels that compose DCTC’s MVPD system, and will request waiver of the Commission’s rules to the extent necessary.

As mentioned above, on April 23, 2007, DCTC filed a request for an STA to utilize vacant EBS channels C2, C3 and D3 within a 35-mile GSA centered on the coordinates N. Lat. 47-13-41.0 and W. Long. 99-12-02.0 to provide MVPD and broadband services from a transmit site located in Brush Hill, North Dakota. DCTC asserts that it has been utilizing vacant EBS channel C2 since approximately 1994, and vacant EBS channels C3 and D3 since 2001, and it was unaware that it was conducting such operations without Commission authorization. DCTC currently has about 585 subscribers for the local programming it provides on channel C2, and 265 broadband subscribers receiving downstream transmissions on channels C3 and D3. The STA is requested for an initial period of six months so that DCTC will be able to continue to provide MVPD and broadband service to its customers until the Brush Hills, North Dakota GSA transition is completed and the existing services on the unlicensed spectrum can be migrated to authorized spectrum.

Interested parties may file comments on the waiver request and/or the STA request on or before **June 25, 2007**. Parties interested in submitting reply comments must do so on or before **July 10, 2007**.

All comments should reference the subject waiver request and/or STA request, including the DA number of this Public Notice, and should be filed with the Office of the Secretary, Federal Communications Commission, 445 12<sup>th</sup> Street SW, TW-A325, Washington DC 20554. This address for FCC locations should be used only for documents filed by United States Postal Service first-class mail, Express Mail, and Priority Mail. Hand-delivered or messenger-delivered documents for the Commission's Secretary are accepted only by the Commission's contractor, Natek, Inc., at 236 Massachusetts Avenue NE, Suite 110, Washington DC 20002. The filing hours at this location are 8:00 a.m. to 7:00 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes must be disposed of before entering 236 Massachusetts Avenue NE. Other messenger-delivered documents, including documents sent by overnight mail (other than United States Postal Service Express Mail and Priority Mail) should be addressed for delivery to the Commission's Secretary, Office of the Secretary, Federal Communications Commission. See FCC Announces a New Filing Location for Paper Documents and a New Fax Number for General Correspondence, *Public Notice*, 16 FCC Rcd 22165 (2001).

The full text of the waiver request, STA request, comments, and reply comments will be available for inspection and duplication during regular business hours in the FCC Reference Information Center (RIC) of the Consumer and Government Affairs Bureau, Federal Communications Commission, 445 12<sup>th</sup> Street SW, Room CY-A257, Washington DC 20554. Copies also may be purchased from the Commission's duplicating contractor, Best Copy and Printing, Inc. (BCPI), Portals II, 445 12<sup>th</sup> Street SW, Room CY-B402, Washington DC 20554. Customers may contact BCPI through its web site, <http://www.bcpired.com>, by e-mail at [fcc@bcpired.com](mailto:fcc@bcpired.com), by phone at (202) 488-5300 or (800) 378-3160, or by facsimile at (202) 488-5563. For further information regarding the public reference file for this waiver request, contact Maria Ringold, Chief, Wireless Branch, RIC, (202) 418-1355.

Unless otherwise provided, requests for waiver of the Commission's Rules are subject to treatment by the Commission as restricted proceedings for *ex parte* purposes under Section 1.1208 of the Commission's Rules, 47 C.F.R. § 1.1208. Because of the policy implications and potential impact of this proceeding on persons not parties to the waiver request, we believe it would be in the public interest to treat this case as a permit-but-disclose proceeding under the *ex parte* rules. See Sections 1.1200(a), 1.1206 of the Commission's Rules, 47 C.F.R. §§ 1.1200(a), 1.1206. Therefore, subsequent to the release of this Public Notice, *ex parte* presentations that are made with respect to the issues involved in the subject waiver request will be allowed but must be disclosed in accordance with the requirements of Section 1.1206(b) of the Commission's Rules, 47 C.F.R. § 1.1206(b).

For further information, contact Genevieve Ross, Broadband Division, Wireless Telecommunications Bureau at (202) 418-1305, or by e-mail at [Genevieve.Ross@fcc.gov](mailto:Genevieve.Ross@fcc.gov).

By the Chief, Broadband Division, Wireless Telecommunications Bureau.

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